ABDUL SHAIK MD IBRAHIM & ANOR *a*

v.

HUSSEIN IBRAHIM & ORS

HIGH COURT MALAYA, PULAU PINANG *b*
ABDUL HAMID MOHAMAD J
[CIVIL SUIT NO: 22-85-1997]
23 APRIL 1999

ISLAMIC LAW: *Syariah Court - Jurisdiction - Determining factors - Whether court should look at relevant State Enactment - Whether to look at State List in Ninth Schedule of the Federal Constitution - Determination of jurisdiction of the matter - Whether court should look at subject matter or remedies prayed for - Federal Constitution arts. 74(2), 121(1A)* *c*

d

ISLAMIC LAW: *Syariah Court - Jurisdiction - Jurisdiction on adoption of a Muslim child - Status of adoption - Whether civil court has jurisdiction to determine status of adoption made under Registration of Adoption Act 1952 - Whether adoption valid - Whether Registration of Adoption Act 1952 applicable to Muslims - Adoption Act 1952, s. 31* *e*

This was an appeal by the first and second defendants ('the defendants') against the decision of the Senior Assistant Registrar dismissing their application to strike out the plaintiffs' claim under the O. 18 r. 19 Rules of the High Court on the basis of non-jurisdiction since both parties were Muslims. The second plaintiff gave birth to a baby girl on 22 June 1989 and registered her name in the birth certificate as Noorhadiah Abdul Shaik ('the child'). The plaintiff and her husband ('the plaintiffs') were sympathetic to the childless defendants, and they therefore gave the child to the latter on condition that the defendants return the child in the event that they should have their own child later. Subsequently, on 28 August 1991, the defendants registered the child for adoption pursuant to the Registration of Adoptions Act 1952, and changed the child's name. On 16 August 1996, the second defendant gave birth to a baby, but nevertheless refused to return the child to the plaintiffs. The plaintiffs in the circumstances applied *inter alia* for a declaration to nullify the adoption and its registration and for the return of the child to them. The issue was whether the plaintiffs' claims herein came within the jurisdiction of the Syariah Court, such that the present court would have no jurisdiction over the matter. *f* *g* *h* *i*

Held:

[1] In view of the provisions of art. 121(1A) of the Federal Constitution, if a matter falls within the jurisdiction of the Syariah Court, the civil courts shall have no jurisdiction over that matter.

[2] In determining the question of jurisdiction of the Syariah Court, the court should look at the relevant State Enactment and not at the State List in the Ninth Schedule of the Federal Constitution, as art. 74(2) of the Federal Constitution empowers the State Legislation to make laws contained in the State List. Further, the use of the word 'any' in the State List can only mean that when a State Legislature makes laws establishing the Syariah Court in a state, it can choose from amongst the matters enumerated in the State List to confer jurisdiction to the Syariah Court.

[3] In determining whether the matter before the court falls under the jurisdiction of the Syariah Court or the civil court, the court should look at the subject matter of the action and not the remedies prayed for. In the present case, the fact that the remedy prayed for in two of the prayers is a 'declaration' does not remove the case from the jurisdiction of the Syariah Court. It cannot be said that the Syariah Court has no jurisdiction over the matter merely because the plaintiffs have prayed for the remedy of declarations.

[3a] Looking at the subject matter of the action, it is clear that the registration of the child as an adopted child of the first defendant was made pursuant to the Registration of Adoption Act 1952. This Act, however, should to be read together with the Adoption Act 1952. And so, since s. 31 of the Adoption Act 1952 excludes the Muslims from the operation of that Act, the Registration of Adoption Act 1952 must likewise have the same effect. It follows that the registration of the child herein was void.

[4] In view of the plaintiffs' claim, the court has jurisdiction to hear and determine it in so far as it seeks a declaration that the adoption of the child and the registration thereof under the Registration of Adoption Act 1952 is void and that the registration should be annulled. However, the court has no jurisdiction to hear and determine the plaintiffs' claim on the issue of custody and the return of the child, since these issues are under the jurisdiction of the Syariah Court under the Islamic Family Law (State of Penang) Enactment 1985.

[Appeal allowed in respect of plaintiffs' application to nullify registration of adoption under Registration of Adoption Act 1952; appeal dismissed regarding prayer for return of child and the alternative prayer for access.]

Case(s) referred to:

Dalip Kaur v. Pegawai Polis Daerah, Bukit Mertajam & Anor [1991] 3 CLJ 2768 ***(refd)***

Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang & Yang Lain [1996] 3 CLJ 231 ***(foll)***

Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman & Satu Yang Lain [1992] 3 CLJ 1675 ***(refd)***

Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan [1997] 4 CLJ Supp 419 ***(refd)***

Mohamad Habibullah Mahmood v. Faridah Dato Talib [1993] 1 CLJ 264 ***(refd)***

Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 2 CLJ 5 ***(refd)***

Legislation referred to:

Administration of Islamic Religious Affairs Enactment 1993 (Penang), ss. 48, 49
Federal Constitution, arts. 74(2), 121(1A)
Islamic Family Law Enactment 1985 (Penang), ss. 81, 82, 83, 84, 85, 86, 87, 107
Registration of Adoption Act 1952, s. 31
Rules of the High Court 1980, O. 18 r. 19, O. 53

Other source(s) referred to:

Merge Legal System To Avoid Injustice, New Straits Times, 15th April 1999, p 10

For the plaintiffs - Mr Thayalan; M/s Thayalan & Assoc
For the 1st & 2nd defendants - Habib Rahman; M/s T Tharuma & Assoc

Reported by Farah Naim

JUDGMENT

Abdul Hamid Mohamad J:

In this case the plaintiffs are husband and wife. The first and second defendants are also husband and wife. The first plaintiff is the brother of the second defendant. They are all Muslims. The third defendant is the Registrar of Adoptions in the state of Pulau Pinang.

On 22 June 1989 the second plaintiff gave birth to a baby girl and was given the name of Noorhadiah binti Abdul Shaik. (Abdul Shaik, the first plaintiff is her natural father). Her name was so registered in her birth certificate.

On 29 July 1989 when the baby was 27 days old the baby was handed over to the first and second defendants to be made their "adopted child" ("untuk dijadikan anak angkat") because the first and second defendants did not have any child of their own even though they had been married for more than nine years.

According to the plaintiffs' statement of claim, it was agreed by both parties that if the first and second defendants were to have their own child later, the first and second defendants would return the said child to the plaintiffs.

On 28 August 1991, the third defendant (the Registrar of Adoptions), on the application of the first and second defendants, registered the child as their adopted child pursuant to the Registration of Adoptions Act 1952. The register shows that the name of the father of the child was changed to Hussain, the first defendant.

On 16 August 1996 the second defendant gave birth to a child. So, pursuant to the alleged agreement, the plaintiffs requested for their child to be returned to them, but the first and second defendants refused. The first and second defendants also refused the plaintiffs' access to their said child. The plaintiffs pray for:

(a) a declaration that the adoption of the child is null and void;

(b) a declaration that the registration of the adoption is null and void;

(c) an order that the adoption and the registration thereof be cancelled;

(d) an order that the first and second defendant return the said child to the plaintiff;

(e) an order that the third defendant annul the registration of adoption and to cancel the memorandum of adoption on the child's birth certificate;

(f) in the alternative the plaintiffs' prayed for access to the said child;

(g) that costs be paid by the first and second defendants.

On 6 May 1997, the first and second defendants filed a summons in chambers praying for an order that the writ and the statement of claim be struck out under O. 18 r. 19 of Rules of the High Court (RHC 1980). Only one point was raised, that is that the claims are within the jurisdiction of the Syariah Court and not this court. The application was heard by the senior assistant registrar. On 20 June 1998 the senior assistant registrar dismissed the application. The first and second defendants appealed to the judge in chambers. After hearing the arguments of both learned counsel, I reserved judgment as I thought I should give a written judgment as the question of jurisdiction of the Syariah Court and this court are always problematical and of public interest.

So, there is now a challenge to the jurisdiction of this court. The plaintiffs say that the matter is within the jurisdiction of this court. The defendants say it is within the jurisdiction of the Syariah Court.

It is settled law that, in view of the provisions of art. 121 (1A) of the Federal Constitution, if a matter falls within the jurisdiction of the Syariah Court, this court has no jurisdiction over it – see judgment of Hashim Yeop A. Sani CJ (Malaya in *Dalip Kaur v. Pegawai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1992] 1 MLJ 1, *Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman & Satu Yang Lain* [1992] 3 CLJ 1675; [1992] 2 MLJ 244, *Mohamad Habibullah bin Mahmood v. Faridah bt Dato' Talib* [1993] 1 CLJ 264; [1992] 2 MLJ 793 and *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5; [1999] 2 AMR 1211.

How should the court approach the problem? There are two issues in this question. First, regarding the law conferring jurisdiction, should the court look at the State Enactments or List II, State List of the Ninth Schedule of the Federal Constitution (the "State List")? Secondly regarding the matter before the court, should the court look at the subject matter of the action or the remedies prayed for?

Regarding the first question, there are (or were?) two views. The view I took in *Lim Chan Seng v. Pengarah Jabatan Agama Islam, Pulau Pinang & 1 yang lain* [1996] 3 CLJ 231 is that the court should look at the State Enactments. On the other hand my learned brother Abdul Kadir Sulaiman J, in *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan* [1997] 4 CLJ Supp 419; [1998] 1 AMR 74 took the view that the court should look at the State List, never mind even if the State Legislature has not made law on the matter.

Has this issue been settled?

The Federal Court, in its latest judgment on the issue written by Mohamed Dzaiddin SCJ has this to say in *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia Kedah & Anor* [1999] 2 AMR 1211 at p. 1231:

> It cannot be disputed that the Syariah Court derives its jurisdiction under a State Law enacted pursuant to Article 74(2) of the Constitution following paragraph 1, State List of the Ninth Schedule of the Constitution and in the case of Federal Territories by virtue of item 6(e) Federal list.

At p. 1233, the learned judge said:

> We hasten to add that both the learned judge in the instant case and Abdul Kadir Sulaiman J in *Md Hakim Lee*, for different reasons, also had recourse to a construction by implication to found the jurisdiction of the Syariah Court to deal with the question of conversion out of Islam. Abdul Kadir Sulaiman J, in particular, adopted a liberal interpretation of the Wilayah Act. On the other hand, Abdul Hamid J, in *Lim Chan Seng* applied a strict interpretation by confining the meaning of the word "jurisdiction" to the express jurisdiction of

a the Syariah Courts enacted in the State Enactments, where in the case he found no express provisions in the Penang State Enactment. Whilst we agree with the approach adopted by Abdul Hamid J following **Habibullah,** that when there is a challenge to jurisdiction the correct approach is to look at the State Enactments to see whether or not the Syariah Courts have been expressly conferred jurisdiction on a given matter, with respect, we do not agree with his Lordship's conclusion that since the Penang Enactment did not expressly confer jurisdiction on the Syariah Court over the matter raised, there was no impediment for the civil court to hear and dispose of the matter.

My understanding of the judgment is as follows:

c (a) when there is a challenge to the jurisdiction of the Syariah Court (or for that matter of this court *vis-a-vis* the jurisdiction of the Syariah Court) the court should look at the State Enactments, not the State List to see whether the Syariah Court has jurisdiction over the matter and if it has, then, this court has no jurisdiction over the matter;

d (b) however in the case of conversion **out** of Islam, since the relevant Penang State Enactment (indeed the Enactments of other States) contains provisions regarding conversion **into** Islam, the jurisdiction over conversion **out** of Islam, may be inferred.

We are only concerned with (a) now. I think the words used Mohamed Dzaiddin SCJ is very clear: "... when there is a challenge to jurisdiction the e correct approach is to look at the State Enactments ...". Secondly, the learned judge also said that they (the Federal Court judges) agreed with my approach in *Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang & 1 Yang Lain* [1996] 3 CLJ 231 following *Mohamed Habibullah bin Mahmood v. Faridah bt Dato' Talib* [1992] 2 MLJ 793. And, this is what Harun Hashim f SCJ said in *Mohamed Habibullah bin Mahmood v. Faridah bt Dato' Talib* [1992] 2 MLJ 793 at p. 800:

> I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the Syariah Court has jurisdiction and not whether the state legislature has power to erect the law g conferring jurisdiction on the Syariah Court.

Article 74(2) of the Federal Constitution empowers the State Legislatures to make laws on matters contained in the State List. The heading of the Ninth Schedule itself is "Legislative List". Article 74(2) does not make law for the States. It is the State Legislatures that make laws for the respective States, h and are empowered to do so on matters contained in the State List. That is why State Legislatures have been making laws on those matters including the establishment of Syariah Courts and conferring them with jurisdiction over matters enumerated therein. For example, see ss. 48, 49 of the Administration of Islamic Religious Affairs Enactment of the State of Penang 1993. Otherwise i it would not be necessary for the State Legislatures to do so.

The other point which so far has not been highlighted is the use of the word "any" in the State List itself:

> ... the constitution, organisation and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion by Islam **and in respect only of ANY of the matters** included in this paragraph ... (Emphasis added).

The use of the word "any" can only mean that when a State Legislature makes laws establishing the Syariah Court in a State, it can choose from amongst the matters enumerated in the State List which of them it wants to confer jurisdiction to the Syariah Courts. Had the drafters of the Constitution intended otherwise, they would have said so. That is why, in my view, the State Legislatures in all States, in all laws that they make establishing Syariah Courts in their respective States have always made provisions regarding the jurisdictions of such courts on specific matters contained in the State List. State Legislatures may of course confer jurisdiction on the Syariah Courts over all matters contained in the State List merely by saying that the Syariah Courts shall have jurisdiction over all matters contained in the State List. But none of the State Legislatures has chosen to do that.

So, it is my humble view that this court in determining the question of jurisdiction of the Syariah Court (and therefore of this court) should look at the relevant State Enactment and not the State List in the Ninth Schedule.

A word should be said regarding the effects of judgments of courts superior to this court on the question of jurisdiction. First and foremost, it should be remembered that Islamic law is a State matter. The court in deciding a particular case must look at the law of the State in which the matter arises. A decision of a court superior to this court may or may not be binding on this court. It is binding if the decision is based on the law of that State or the law of another State that is *in pari materia* with the law of the State in which the matter is being decided. It is not binding if the law of the State applicable to the case is repugnant to such decisions. General principles laid down by superior courts are, of course, binding on this court. A good example is *Soon Singh's* case. All relevant state Enactments contain provisions for conversion into Islam. Even if they do not contain provisions regarding conversion out of Islam, that can be inferred.

Of course, this may result in a situation where on a similar matter the decision arrived at by the court in one State differs from a decision in other State. That is unavoidable, and the court should not be blamed. If the States Legislatures in their wisdom choose to enact different laws or enact differently, that is their prerogative. They must be presumed to have intended it. The court must respect their intentions. It is not the function of the court, indeed it is

outside the powers of the court to try to "legislate", even for the sake of uniformity. The court must adhere to the doctrine of separation of powers between the Judiciary, the Legislature and the Executive. Neither branch should encroach upon the other's territory.

The other point is in determining whether the matter before the court falls under the jurisdiction of which court, the Syariah or this court, should the court look at the subject matter of the action or the remedies prayed for.

This issue is relevant in this case because the first two prayers of the plaintiffs' are for declarations.

In *Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman & Satu Yang Lain* [1992] 3 CLJ 1675; [1992] 2 MLJ 244 the subject matter of the suit was "wakaf". Plaintiff/appellant prayed for an injunction. The Supreme Court held that the claim could only be heard by the High Court. The reason is that the Administration of Muslim Law Enactment 1959 (Penang) did not provide for the remedy of injunctions and therefore the Syariah Court in Penang does not have the jurisdiction to issue an order of injunction. The remedy of injunction is provided by the Specific Relief Act 1950 (and the rules are to be found in O. 53 RHC 1980) which power is given to the High Court. Therefore, a claim for perpetual injunction can only be heard by the High Court. That is what that case decides.

It must be pointed out even under the Administration of Muslim Law Enactment 1993 which replaced the 1959 Enactment, there is no provision for the remedy of injunction or declaration and, until today, there is still no Civil Procedure Rules or Enactment for the Syariah Courts in Penang. However, there is provision for a specific kind of injunction, that is, injunction against molestation under s. 107 of the Islamic Family Law Enactment 1985 (Penang) which is not applicable here. So, if I were to adopt the approach laid down in *Isa Abdul Rahman* regarding the two prayers, even at the outset the Syariah Court has no jurisdiction to grant them.

I have with the greatest of respect to the Supreme Court pointed out in *Lim Chan Seng* that the judgment may give rise to an undesirable effect: a party may by the inclusion of a prayer for a remedy not provided in the law applicable to the Syariah Court, remove a matter the subject matter of which is within the jurisdiction of the Syariah Court, to the Civil Court.

It appears to me that the Federal Court has now adopted the "subject matter" approach rather then the "remedy prayed for" approach. This is to be found in the passage which I have reproduced earlier which perhaps I may be excused for reproducing part of it again:

> whilst we agree with the approach adopted by Abdul Hamid J following *Habibullah* that when there is a challenge to jurisdiction the correct approach is to look at the States Enactment to see whether or not the Syariah Courts have been expressly conferred jurisdiction **on a given matter** ... (emphasis added).

It is also important to note that in *Soon Singh's* case itself the remedy sought was for a declaration. Yet, the Federal Court considered the question of jurisdiction purely on the "subject matter approach".

In the circumstances, I think I am no longer bound by *Isa Abdul Rahman's* case. Therefore, in this case the fact the remedy prayed for in two of the prayers, ie, declaration, does not remove the case from the jurisdiction of the Syariah Court. In other words, in the present case I do not hold that the Syariah Court has no jurisdiction over this matter merely because the plaintiffs have prayed for the remedy of declarations.

Now, looking at the subject matter of this action, what is of utmost importance is the registration of the child as an adopted child of the first defendant by the Registrar of Adoptions pursuant to the Registration of Adoptions Act 1952.

The first question that arises is whether the Act applies to Muslims. The Act is silent. However, s. 31 of the Adoption Act 1952 provides:

> 31. This Act shall not apply to any person who profess the religion of Islam either so as to permit the adoption of any child by such a person or so as to permit the adoption by any person of a child who according to the law of Islam is a Muslim.

The reason why Muslims are excluded from the operation of the Adoption Act 1952 is obvious. The effect of adoption under the Act is repugnant to Islamic Law. I need not elaborate on this.

I am of the view that the two Acts should be read together otherwise the purpose for excluding Muslims from the operation of the Adoption Act 1952 is defeated.

I am therefore of the view that the registration is void.

The next question is whether this court or the Syariah Court has jurisdiction to declare the registration void.

The Act is a Federal Law that clearly falls under para. 4(e) of List I, Federal List of the Ninth Schedule of the Federal Constitution which empowers the Federal Legislature to make laws regarding adoption of non-Muslims. But the Registrar of Adoptions has wrongly applied it on a Muslim child. I think it is within the jurisdiction of this court to declare that the Registrar of Adoptions

was wrong when he applied the Act to Muslims. Therefore, I am of the view that the claim, in so far as it seeks a declaration that the adoption of the child and the registration thereof under the Registration of Adoptions Act 1952 is void and that the registration should be annulled, is within the jurisdiction of this court to hear and determine.

However, there are other prayers ie, that the defendants return the said child to the plaintiffs, or in the alternative that the plaintiffs be given access to the child.

The Islamic Family Law (State of Penang) Enactment 1985 contains provisions regarding custody of a child – ss. 81 to 87. It also contains provisions regarding guardianship of a child.

I am of the opinion that the prayer for the return of the child involves, at least the question of custody which is a matter clearly within the jurisdiction of the Syariah Court.

In the circumstances, I dismiss the appeal regarding the registration of the adoption under the Registration of Adoptions Act 1952, but allow the appeal regarding the prayer for the return of the child to the plaintiff and the alternative prayer for access. The plaintiff should file a fresh action in the Syariah Court for the last mentioned prayers.

It is unfortunate for the Muslims of this country that, in a matter as this, they have to commence two separate actions in two different courts which entails more costs and delays. In a similar matter involving non-Muslims, in one action in this court, all the prayers could be heard and decided by this court alone. Perhaps my suggestion in *Lim Chan Seng* on unification (or merger) of the Syariah and Civil Courts is worth considering. It is heartening to note that former Supreme Court judge, Harun Hashim, has expressed a similar view in his article *"Merge legal system to avoid injustice"* – see New Straits Times 15 April 1999, p. 10. Of course it would not be an easy thing to do.

In the circumstances of this case I make no order as to costs.